IN THE

Supreme Court of the United States

October Term, 1933
290

CHASE NATIONAL BANK OF THE CITY OF NEW YORK, SUCCESSOR TRUSTEE TO THE EQUITABLE TRUST COMPANY, OF NEW YORK, N. Y.,

Petitioner,

vs.

THE CITY OF NORWALK, OHIO,

Respondent.

REPLY BRIEF OF PETITIONER

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

GEO. D. WELLES,
Toledo, Ohio,
Counsel for Petitioner.

EARL F. BOXELL,
Toledo, Ohio,
TRACY, CHAPMAN & WELLES,
Toledo, Ohio
ARTHUR A. GAMMELL,
New York, N. Y.
TIMOTHY N. PFEIFFER,
New York, N. Y.
MILBANK, TWEED, HOPE & WEBB,
New York, N. Y.
Of Counsel for Petitioner.

The Wilkinson-Sloat Printing Co.,
1217 Jackson St., Toledo, O.

TOPICAL INDEX

Page

A. Introduction 1

B. Statement of Case 1

C. Argument 3

I. The Injunction Granted By The District Court Does Not Violate Judicial Code Section 265. Petitioner is Entitled To Maintain This Suit On The Showing Made In The District Court.... 3

II. Equitable Relief Is Justified Because Of Action Taken And Threatened by the Respondent City 20

III. Petitioner Has A Valid Lien Upon Existing State Granted Franchises Of Its Mortgagor In The Streets of Respondent 22

1. The Ordinance of October 7, 1890 Was Inefective As A Franchise Grant, But Became Effective As A Mode of Use Agreement 22

2. The Franchise Rights of Petitioner's Mortgagor in Norwalk Are Incontestible..... 30

IV. The Questions As To The Existence Of The Franchise Rights And Petitioner's Interest Therein Should Be Determined According To The Law Of Ohio As Established At The Time The Mortgage Was Given And The Bonds Issued 40

V. The Rights Of The Predecessors Of Plaintiff's Mortgagor Were Not Terminated By Any Provisions Of The Public Lighting Contract Of 1905 42

VI. The Respondent City Is Estopped To Deny That An Agreement As To Mode Of Use Has Always Existed 43

D. Conclusion 45

Atchison Ry. Co. v. Wells, 265 U. S. 101 13
Ballard & Ballard Co. v. Munson Steamship Line, 25 Fed. 2nd, 252 19
Blair v. Chicago, 201 U. S. 400 31
Bristow Battery Co. v. Board of Commissioners, 37 Fed. 2nd 504 15
Burgess v. Seligman, 107 U. S. 20 16
Cincinnati v. Diamond Light Co., 4 Ohio App. 177 39
Cleveland v. Cleveland City Railway Company, 194 U. S. 517 27
Cleveland Electric Ry. Co. v. Cleveland, 204 U. S. 116 31
Columbus Citizens Telephone Co. v. Columbus, 88 O. S. 466 24
Columbus Ry. Light & Power Co. v. Columbus, 249 U. S. 399 27
Columbus v. Public Utilities Commission, 103 O. S. 79 ..... 24, 28
Coombes v. Getz, 285 U. S. 434, 441 41
Essanay Film Mfg. Co. v. Kane, 258 U. S. 358 ..... 18, 19
Evans v. Gorman, 115 Fed. 399 18
Farmer v. Columbiana Telephone Co., 72 O. S. 526 ..... 25, 29, 36
Farmers Loan & Trust Co. v. Meridan Waterworks Co., 139 Fed. 661, 670 3
Feldman v. Beier, 78 N. Y. 293 3
Galpin v. Page, 18 Wall. 350 14
Hardin-Wyandot Lighting Co. v. Upper Sandusky, 93 O. S. 428, 251 U. S. 173 ..... 23, 25, 27, 33
Harrison, et al v. Triplex Gold Mines, Ltd., et al, 83 Fed. 2nd 667 ..... 17, 18, 30
Hatersly v. Waterville, 16 O. C. C. 226 23
Hawks v. Hamill, 288 U. S. 52 40
Hill v. Beebe, 13 N. Y. 556 3
Indianapolis v. Consumers Gas Trust Co., 144 Fed. 640 .. 36

In re Rochester Electric Railway Company, 123 N. Y. 351 ..... 36.
In re Utica Nat. Brewing Co., 154 N. Y. 268, 48 N. E. 521 3
Kinsman Street Railroad Co. v. Broadway R. R. Co., 36 U. S. 239 23
Kuhn v. Fairmont Coal Company, 215 U. S. 349 16
Louisville Trust Co. v. Cincinnati, 76 Fed. 296, 300 ..... 19, 35
Macklin v. Home Telephone Co., 1 O. C. C. 373, 70 O. S. 507 ..... 29, 32
Moore-Mansfield Construction Co. v. Electrical Installation Co., 234 U. S. 619 17
Northern Ohio Traction Co. v. Ohio, 245 U. S. 574 ..... 25, 26, 37
Ohio Public Service Co. v. State, 274 U. S. 12, 113 O. S. 325 ..... 25, 38
Old Colony Trust Company v. Omaha, 230 U. S. 100 ..... 11, 13, 37
Old Wayne Life Association v. McDonough, 204 U. S. 8 .. 13
Pawhuska v. Pawhuska Oil and Gas Company, 28 Okla. 563 36
People, ex rel Fitzhenry v. Union Gas & Electric Company, 254 Ill. 395, 98 N. E. 768 9
Pike's Peak Power Company v. Colorado Springs, 105 Fed. 1 24
Pomona v. Sunset Telephone Co., 224 U. S. 330 35
Queen City Telephone Co. v. Cincinnati, 73 O. S. 64 ..... 25, 32, 36
Revised Statutes, Section 3461 ..... 32, 35
Riegel v. Belt, 119 O. S. 369, 378, 379, 164 N. E. 347, 350 .. 3
Russell v. Detrick, 23 Fed. 2nd 175 17
Schriver v. Woodbine Bank, 285 U. S. 467, 475 41
Sears, Trustee v. City of Akron, 246 U. S. 242 38
Simon v. Southern Railway Co., 236 U. S. 115 ..... 10, 19
Southern Bell Telephone Co. v. Richmond, 103 Fed. 31 .. 36
State ex rel v. Central Union Telephone Co., 11 O. C. C. 55 34

State ex rel Martin v. The Ohio Electric Power Co., 35 O. A. R. 481, 121 O. S. 235 ..... 36, 40

State ex rel Matthews v. Central Union Telephone Co., 14 O. C. C. 273 29

Thompson on Corporations, Vol. 3, 3rd Ed., Sections 2343 and 2403 3

Tidal Oil Co. v. Flanagan, 263 U. S. 444 17

Toronto Electric Light Co. v. Toronto, 1917 A. C. 84, 33 Ont. L. Rep. 267 36

Wabash R. R. Co. v. Defiance, 167 U. S. 88 31

Western Union Telegraph Co. v. L. & N. Railroad Co., 218 Fed. 628 18

Western Union Telegraph Company v. Tompa, 51 Fed. 2nd 1032 13

Zanesville v. Zanesville Telegraph & Telephone Co., 64 O. S. 67 ..... 25, 34, 36

IN THE

Supreme Court of the United States

October Term, 1933
290

CHASE NATIONAL BANK OF THE CITY OF NEW YORK, SUCCESSOR TRUSTEE TO THE EQUITABLE TRUST COMPANY, OF NEW YORK, N. Y.,

Petitioner.

VS.

THE CITY OF NORWALK, OHIO,

Respondent.

REPLY BRIEF OF PETITIONER

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

A.

INTRODUCTION

While we are reluctant to add another brief to those before the court, we feel obliged to correct certain assertions of fact contained in respondent's brief, and to point out briefly what we deem to be some of the fallacies in respondent's argument.

B.

STATEMENT OF CASE

Respondent claims that the record contains no evidence that the Norwalk City Council was informed of an intention by the Norwalk Incandescent Light Com-

pany, the partnership formed in 1890, to organize a corporation. (Respondent's Brief page 3). This claim is made in spite of the fact that at the time of presentation of the ordinance of October 7, 1890, to the Council, as shown by the record, Mr. Dunmore and Mr. Suhr, two of the partners, frankly told the Council what they proposed to do (R. 61) and prior to the passage of the ordinance the partners had discussions with members of the Council and told them what the partnership plans were (R. 62). Furthermore, when the partnership property was transferred to The Incandescent Light & Power Company, the corporation organized in 1891, the Council confirmed the action of the partners in transferring the partnership property to the corporation (R. 62) and at page 63 of the record is Mr. Suhr's testimony as follows:

> "There is no question but what the Council had been acquainted with the fact that a corporation was being formed."

Respondent at page 7 of its brief says that the only bonds now outstanding are $2,248,500 (the correct figure is $2,600,000, see the record pages 425-430), and that the first of these bonds were issued June 20, 1927, which was after the filing of the quo warranto case in the state court against petitioner's mortgagor. (Respondent's brief p.7).

Respondent in its brief does not base any argument upon this statement, but if the statement is made with some artful design of suggesting to this court that the rights of the bondholders were acquired after the commencement of the quo warranto suit and are therefore not entitled to protection in this suit, it is sufficient to observe that the bonds now outstanding were issued pursuant to the terms of the mortgage and supplemental mortgage

given long before the quo warranto suit was filed (plaintiff's exhibits 28 and 29, R. 379 and 412); and that $1,579,300 thereof were issued for the redemption and in lieu of the same amount of bonds (specifically including those issued upon the basis of the Norwalk property) sold and distributed before the quo warranto proceeding was commenced (R. 184-191; 425-428). There was no payment or discharge of the mortgage and accordingly the present bondholders in equity occupy exactly the same position as the original bondholders, as the District Court held. Memorandum opinion (R. 236) and the following authorities there cited:

3 Thompson on Corporations, 3rd Ed. Sections 2343 and 2403.

Louisville Trust Co. v. Cincinnati, (C. C. A. 6) 76 Fed. 296, 300.

Farmers Loan and Trust Company vs. Meridian Waterworks Company, 139 Fed. 661, 670.

Hill vs. Beebe, 13 N. Y. 556.

Feldman v. Beier, 78 N. Y. 293.

In Re Utica Nat. Brewing Co., 154 N. Y. 268, 48 N. E. 521

Riegel vs. Belt, 119 O. S. 369, 378, 379, 164 N. E. 347, 350.

C.

ARGUMENT

I.

The Injunction Granted by the District Court Does Not Violate Judicial Code Section 265. Petitioner is Entitled to Maintain This Suit On the Showing Made In the District Court.

Respondent makes a plain misstatement at page 12 of its brief in asserting that the District Court injunction

"* * * enjoins the Court of Appeals of Huron County, Ohio, itself, from taking any action whatsoever in the quo warranto case."

Respondent has gone to the length of quoting the injunction in its entirety at pages 8, 9 and 10 of its brief, and the italicized portion on page 9 clearly exhibits respondent's error. The italicized portion shows that not the court itself but that the City and its representatives and others to whom notice of the injunction should come were enjoined

"* * * from applying to any of the courts of the State of Ohio for any writ, process or order * * *."

Obviously the state courts would not make application to themselves for the issuance of a writ or order to enforce the ouster decree, and hence respondent's assertion that the state courts, themselves, are enjoined is a palpable misconstruction.

The respondent in its brief at pages 12, 21, 22, 23 and 24 labors very hard upon the argument that it was not and could not be a party to the quo warranto case; and that it has no standing to seek enforcement of the decree therein, ergo that the injunction granted by the District Court must act upon the Court of Appeals of Huron County, Ohio, otherwise the injunction could have no effect.

It is contended further that the respondent City could not be the real party in interest in the quo warranto suit because quo warranto is the exclusive prerogative of the State of Ohio; that therefore the State of Ohio is the necessary party in this case, and the action should be dismissed as an attempt in effect to sue the state by indirection in violation of the constitutional inhibition against doing so without the state's consent.

The respondent city asserts that the injunction does not fall within the class of cases in which an injunction may be had against enforcement of a judgment by a party to a state court suit, because neither of the parties to this suit were parties to the quo warranto action. Patently quite the reverse must be true taking the case upon the basis of the respondent's own position just paraphrased from its brief (respondent's brief page 12). It is perfectly obvious that the circuit court of appeals treated the respondent city in effect as though the city had been the real plaintiff in the quo warranto suit, otherwise that court would not have held Judicial Code Section 265 applicable at all. Thus respondent in its brief flatly abandons the ground relied upon by the Circuit Court of Appeals in its opinion, and now asks this court to affirm the decision upon a basis diametrically opposed to the opinion of that court. If, as the respondent city says, it was not a party to the quo warranto action and had no standing as a party in the proceedings therein, then it is entirely clear that Section 265 does not bar petitioner from the relief obtained in the District Court for the simple reason that Section 265 is out of the case all together.

However, it does not follow therefrom that the injunction granted by the District Court was a nugatory or vain thing, or that it necessarily constituted a restraint upon the state courts, as the respondent city argues. As the record in this case clearly shows, and as we have pointed out in our main brief, the respondent city instigated, financed and conducted the quo warranto case for its own profit, and not for the benefit of the State of Ohio. It simply caused its attorneys in conjunction with the Prosecuting Attorney of Huron County, Ohio to borrow the name of the State of Ohio to bring a suit to oust the Ohio Electric Power Company without regard for the rights of

this petitioner. Certainly the inevitable inference is that, unless the city is restrained from taking any steps to secure the enforcement of the quo warranto decree, it will seek through its attorneys, or otherwise, to get the state courts to enforce the decree. The city sought and obtained the decree, under the name of the State it is true, and it follows as the day does the night that the city will undertake to secure the enforcement of the decree. Nor does this conclusion have to rest upon inevitable implication or inference, because counsel for the respondent city in their brief at page 28 in discussing the agreement which was made in 1926 between the city solicitor and counsel for petitioner's mortgagor for the maintenance of the status quo during the pendency of the quo warranto litigation:

> "It shows a continuing intention upon the part of the city not to resort to anything other than orderly court action."

And see also respondent's statement to the same effect at page 26 of its brief.

What court action? Obviously it could mean only the insistence of the city upon carrying out the quo warranto suit and securing the enforcement of the decree obtained therein. There has been no other court action by the respondent city, hence we confidently say that the city having been at all times the only motivating force back of the quo warranto suit, the city can and should be enjoined as decreed by the District Court. It is not necessary that the injunction be directed to the state courts either in terms or by any necessary inference of such effect. If this court affirms the action of the District Court, it is inconceivable that the state courts would then in complete disregard of comity act upon their own volition to enforce

the quo warranto decree contrary to the decision of this court, and thereby work a destruction of this petitioner's rights.

Nor will it do for respondent to attempt a distortion of the issues as it does at page 21 of its brief in asserting that petitioner's whole case is based upon the theory that all rights of public utilities in a municipality come from the State of Ohio, which respondent asserts further is inconsistent with our contention that the city was the real party in interest in the quo warranto litigation.

Our claim as stated in our main brief is that petitioner holds a valid lien which attached prior to the quo warranto suit to franchise rights which were derived from the State of Ohio by electric light and power companies (predecessors of petitioner's mortgagor) organized prior to 1896. Nothing in that claim is inconsistent with our further claim that the city is the only impelling force behind the quo warranto suit. Neither does this action constitute any attempt to secure relief against the State of Ohio by indirection. The State of Ohio took no action to oust petitioner's mortgagor from Norwalk; it has not sought to intervene herein and in no manner whatever has the State of Ohio exhibited the slightest interest in this controversy. Nor can the city claim any rights for the State herein. The bugaboo of the State of Ohio as the real party in interest is an attempt by the city to do a "Doctor Jekyll and Mr. Hyde". First the city instigates and conducts a quo warranto suit without making petitioner a party thereto, and having succeeded in getting a decree therein attempts to disclaim all responsibility for the action and says it had nothing to do with it—that it was solely the affair of the State of Ohio. We respectfully submit that the respondent city may not so easily shift its disguise for the purpose of destroying petitioner's rights.

The entire argument of the respondent contains the erroneous suggestion that the present controversy is concerned solely with the quo warranto proceedings, and that this petitioner, although not a party thereto, is bound by what happened therein. This is not true, because as we have shown in our main brief, the bill of complaint and amendments and supplements thereto and the evidence show that petitioner has a complete cause of action against the city based upon the city's unlawful acts and threats wholly apart from the quo warranto proceedings. However, confining ourselves to the narrower question as it relates to the quo warranto decree, we find that counsel for the respondent have set forth and cited authorities in support of the proposition that quo warranto must be brought by the state and that such action is discretionary with the state officials. While the authorities cited in general support this proposition, the entire argument is beside the mark. The real question is not whether or not the city could bring a quo warranto suit in its own name—the real question is whether the case made here is one against the city or the state. Respondent's brief contains no authority in support of its contention that this suit is in reality against the State. Petitioner's pleadings ask no relief against the State and the decree does not attempt to enjoin the State.

Respondent asserts at page 22 of its brief that the Hardin-Wyandot case (93 O. S. 428) held a municipality could not bring an action to secure the removal of an electrical distribution system from its streets, but that the State of Ohio alone could bring such an action. This is an attempt to assimilate the result in that case to respondent's theory rather than to state the actual holdings of the court. The State Supreme Court did not hold that a muni-

cipal corporation could not bring an action to secure the removal of the system, or that it could not be wholly responsible for the bringing of such action in the name of the state.

Directly opposed to respondent's contention is *People, ex rel Fitzhenry v. Union Gas & Electric Company*, 254 Ill. 395, 98 N. E. 768, which was a quo warranto suit to oust the defendant utility company. Defendant claimed that plaintiff was estopped by its conduct from questioning defendant's right to use the streets. In an attempt to avoid the estoppel it was claimed that the action was by the state. Disposing of this claim the court said at page 776 of 98 N. E.

> "Appellee insists that this is a proceeding by the state questioning the right of appellant to exercise a franchise belonging to the state, and therefore the law of estoppel does not apply, (1) because that doctrine cannot be invoked against the state; and (2) the state cannot be estopped by the action or nonaction of the city. *It is true, this suit was begun in the name of the people, but it was brought on the relation of the city attorney of the city of Bloomington, and the affidavit of the relator filed in support of the petition for leave to file the information states that the suit was ordered begun by the city council of the city of Bloomington.* The state granted appellant the authority to exercise its franchise in the city of Bloomington, by and with the consent of the city. The grant from the state was subject to the granting of permission by the municipal authorities. The state, however, was not particularly interested whether the city granted the permission by ordinance, or whether it suffered appellant to exercise the franchise granted it by the state without adopting an ordinance licensing it to do so. *So far as that question is concerned, therefore, the city*

is the real party in interest, and the suit is to be so regarded and treated. People v. Central Union Telephone Co., 232 Ill. 260, 83 N. E. 829; Chicago & Northwestern Railway Co. v, People, 91 Ill. 251." (Italics ours)

Respondent on page 14 of its brief claims a distinction between the right of interference with the enforcement of money judgments and that of interference with the enforcement of a quo warranto decree.

It is not perceived why such a distinction is important or how it can operate against this petitioner. In the one case the plaintiff, holding the money judgment would get out a writ of execution in order to collect, and in the other case the respondent city would apply or have its own paid counsel apply to the court to enforce the ouster. In either case the detriment to the party wronged by the unconscionable enforcement of the judgment would be just as sure and complete. It is no answer to say, as respondent does at page 14 of its brief, that proceedings in quo warranto are still pending within the meaning of Judicial Code Section 265 because the writ of ouster remains unexecuted. The case in that respect stands in no different position from an unexecuted money judgment, and of course respondent's argument carried to the logical conclusion would leave every complainant in suits of this character remediless in the federal courts, for the federal court could not act until the state court judgment had been fully carried out, when necessarily it would be too late to afford complainant any relief. The situation here is precisely the situation which exists when any judgment has been obtained and an attempt is about to be made to make an unconscionable use of that judgment, which is recognized in *Simon v, Southern Railway Co.* 236 U. S. 115 as the

appropriate stage for relief unaffected by the inhibitions of Section 265.

Respondent at page 15 of its brief asserts that in all the cases cited by petitioner herein where a federal court enjoined the prevailing party in the state court from enforcing a judgment secured therein, the judgments were for money only. We have already shown, we think, that any such distinction, if it were true, would be of no importance.

A further inconsistency in respondent's position again appears in that respondent in putting forth this argument considers itself as having been the prevailing party in the quo warranto action, although as observed above, it at the same time vehemently denies that it was a participant in the quo warranto suit. At all events the assertion that there can be relief only against enforcement of a money judgment is untrue. It is necessary only to allude to the decision of this court in the case of *Old Colony Trust Company v. Omaha*, 230 U. S. 100, in which the defendant city was restrained from taking any benefit from a prior decree obtained by it in federal court upholding the validity of a city ordinance. Of course upon the point under discussion it is the character of the prior judgment involved which is in issue, and the fact that the prior suit in the Old Colony case was in the federal court instead of the state court makes no difference.

It is also erroneously stated at page 13 of respondent's brief that in all of the cases cited by petitioner the state court judgment enjoined in the federal court was void or voidable on some well recognized equitable ground, whereas, in the case at bar it can be claimed only by petitioner that it has not been heard upon the merits of its mortgagor's claim of a perpetual franchise in Norwalk.

It is also said that the sole claim of petitioner is that it has presented its claim that the 20-year limitation of the 1890 ordinance was not a binding covenant upon a different theory from the presentation of the same claim by Ohio Electric Power Company in the quo warranto proceedings.

These assertions by respondent at page 13 of its brief constitute a plain distortion of the position taken by this petitioner. Such statements do not take into account that petitioner is asserting the right to protection of a valid lien secured before the quo warranto proceedings upon presently existing franchise rights of petitioner's mortgagor, and such statements are an unwarranted attempt to limit the question involved to the effect solely of a 20-year ordinance, whereas it clearly appears from a reference to the record and to our main brief at page 43 and at pages 68 to 70, both inclusive, that many vital elements are present in this record which make this case widely different from the quo warranto action. The same erroneous conception of the issues herein appears in the first paragraph of respondent's brief on page 20 thereof, where it is stated that in all the cases cited by us for the proposition that the enforcement of a void judgment may be enjoined in a federal court the judgment was either tainted with fraud or obtained under mistake of fact. That statement is inaccurate in any sense for it unquestionably appears from the decisions of this court that the power of federal courts to restrain the enforcement of state court judgments is not confined to those which are void. Nor is it true that in every case cited by us wherein a federal court plaintiff had relief against the enforcement of or from enjoying the benefits of a state court judgment, the state court judgment was tainted with fraud or obtain-

ed under mistake of fact. Cases in which no such thing appeared are:

Old Colony Trust Co. v. Omaha, 230 U. S. 100
Atchison Ry. Co. v. Wells, 265 U. S. 101
Western Union Telegraph Company v. Tompa, (C. C. A. 2 1931) 51 Fed., 2nd Series, 1032.

The true proposition is that petitioner was entitled to maintain this suit unembarrassed by the quo warranto decree on the showing made, that it was not a party to the quo warranto proceedings, that it had a preexisting lien upon the Norwalk properties and franchises of Ohio Electric Power Company, and that the enforcement of the quo warranto decree would irreparably injure its property rights, and that failure on its part to apply for leave to intervene in the state court proceedings by this petitioner, even if it had possessed extra judicial notice thereof, could not constitute negligence barring relief in equity. This is the proposition established by that section of our main brief, pages 29 to 36, both inclusive.

We have informed counsel for the respondent of our intention to rely in argument upon the case of *Old Wayne Life Association v. McDonough*, 204 U. S. 8, which was not cited in our main brief. We desire to add this case to those cited at pages 30 to 36 of our main brief for the reason that the opinion of the majority of the Circuit Court of Appeals in the case at bar contains this statement:

> "The mortgage was given in 1925, and though the appellee" (petitioner here) "was not made a party to the state suit, it is not alleged or claimed that it did not have knowledge of the proceeding or that it could not have intervened there, as mortgagee, and asserted the claims that it now makes as the basis of the relief here sought."

The fact that the record did not contain such evidence seems to have been very influential in leading the majority of the court below to the conclusion that petitioner's bill of complaint should be dismissed.

The *Old Wayne Life Association* case conclusively shows that the court below was in error in attaching any importance to the absence of such evidence. That case was an action in the state courts of Indiana against the Association upon a judgment by default rendered against it in a Pennsylvania court, the only service having been a summons served upon the Insurance Commissioner of Pennsylvania.

In the case to enforce the judgment in the Indiana state courts, the plaintiff from Pennsylvania set up the proceedings in the courts of that state. The Association denied the material facts of the petition and alleged, in the words of the opinion of this court at page 14.

> "* * * that the first notice or knowledge it ever had of the alleged judgment against it was long after the day when it appears to have been rendered."

However, in the words of the opinion at page 19, "*the defendant Association introduced no evidence.*" (Italics ours). The court held that the attempted service of process in Pennsylvania was invalid and, although as we have just shown the Association offered no evidence that it did not have actual knowledge of the pendency of the Pennsylvania case in time to have presented its defense therein, this court reversed the action of the Indiana courts in entering judgment against the Association based on the Pennsylvania judgment. In doing so, this court at page 17 of its opinion quoted from the old case of *Galpin v. Page*, 18 Wall. 350, stating the rule as follows:

> "* * * 'It is a rule as old as the law, and never

more to be respected than now, that no one shall be personally bound until he has had his day in court, by which is meant, until he has been duly cited to appear, *and has been afforded an opportunity to be heard.* Judgment without such citation and opportunity wants all the attributes of a judicial determination; it is judicial usurpation and oppression, and can never be upheld where justice is justly administered.' "

We, therefore, submit that the court below erred in holding that this petitioner is not free to maintain this suit without showing affirmatively that it had no knowledge of the quo warranto action until after final judgment therein, or that it could not have appeared therein to assert its rights.

Respondent at page 16 has cited a number of cases for the proposition that the injunction granted by the District Court constitutes a direct interference with the proceedings in the state court.

The case of *Bristow Battery Co v. Board of Commissioners,* 37 Fed. 2nd, 504, is plainly distinguishable from the case at bar.

In the report of the Bristow case there appear the following statements:

1. "Clearly, the contract clause (Article 1, Section 10) is not here involved. No claim is made that the State or City passed a law or enacted an ordinance after these bonds were issued impairing their obligations."

2. "Rogers County" (the federal court plaintiff) "was not a party to either the Eaton case or the Bristow Battery Company case. It is in no manner bound by the judgment in either, and is as free to ask protection of its rights in the courts of the state now, as it was before these cases were decided.

Neither of these judgments has deprived it of its property."

3. "There is no diverse citizenship".

4. "In substance, the bill of complaint asks a federal court to review the rulings of the state supreme court in cases to which complainant was not a party, and to hold that the supreme court was in error. Such a contention does not present a federal question."

From the foregoing it sufficiently appears that the Bristow case is not an authority bearing upon the present case in any way. Here, there is diversity of citizenship; here, the contract clause, Article 1, paragraph 10, is involved, and here, petitioner does not ask the federal court to review the rulings of the state supreme court and to hold that the supreme court was in error. On the contrary, here, the petitioner had a right to choose the federal court as its forum because of diversity of citizenship, and a further right to choose that forum because of the constitutional questions under the contract clause and here petitioner presents the case on facts, varying widely from those in the case decided by the Supreme Court of Ohio.

The case at bar comes within, while the Bristow case falls without, that class of cases in which this court and other federal courts have held that persons situated like the petitioner are entitled to the independent determination of the federal courts upon the questions as to their rights, there being either diversity of citizenship or a constitutional question, or both.

Burgess vs. Seligman, 107 U. S. 20

Kuhn vs. Fairmont Coal Company, 215 U. S. 349.

Moore-Mansfield Construction Co. vs. Electrical Installation Co., 234 U. S. 619

Tidal Oil Co. v. Flanagan, 263 U. S. 444.

Furthermore, while we insist that petitioner under the foregoing authorities would be entitled to a readjudication of the same questions of fact and of law determined in the quo warranto proceedings, this case is not an attempt to review the rulings of the State Supreme Court in the quo warranto case. Hence, it is unlike the *Bristow* case, for it there appeared, as shown by the fourth excerpt from that case quoted above, that it was in substance an undertaking to review the rulings of the Oklahoma Supreme Court. See the fourth foot note to the opinion by Judge Hahn in the District Court:

> "And it is not unlikely that the decision of the Supreme Court of Ohio would have been in favor of the utility upon the vitally different record made in this case. That court's decision to a large extent is based upon the fact that no agreement, other than the Ordinance of 1890 and the street-lighting contracts of 1895 and 1905 were ever entered into with reference to the use and occupancy of the streets.
>
> • • •
>
> In this case the answer of the defendant admits the enactment of the ordinance of July 1, 1924, (Plaintiff's Exhibit No. 38), which is still in full force and effect. It applies to the Ohio Electric Power Company, and, as already noted, the city demanded and received full compliance with the ordinance on the part of the utility. The ordinance is tantamount to a consent to the use of the streets of the city of Norwalk. The record in the case in the Supreme Court of Ohio shows that the ordinance was never called to the attention of that court." (R. 238, 239)

Russell v. Detrick, 23 Fed. 2nd 175, *Harrison, et al v. Triplex Gold Mines, Ltd., et al*, 33 Fed. 2nd, 667, and

Western Union Telegraph Co. vs. L. & N. Railroad Co., 218 Fed. 628, were all cases in which the plaintiff sought to restrain further proceedings in suits in state courts prior to the securing of judgment in the state courts, and obviously for that reason came within the inhibitions of Judicial Code Section 265. By the same token these cases furnish no support for the proposition that the injunction granted by the District Court was an interference with the quo warranto proceedings in the state courts.

In addition, in the case of *Harrison, et al vs. Triplex Gold Mines, Ltd.*, it clearly appeared that the federal court plaintiffs had been parties to the prior suit, which was in the Canadian courts, and there had enjoyed full opportunity to present their alleged claims that the prior judgment had been obtained by fraud.

In *Evans vs. Gorman*, 115 Fed. 399, it was very evident that the entire estate of the deceased person with which the controversy was concerned had come under the jurisdiction of the state probate court before the federal suit was instituted and relief granted. A demurrer to the bill in the federal court was sustained upon well recognized grounds of comity.

It is very plain that the injunction was denied in *Essanay Film Mfg. Co. vs. Kane*, 258 U. S. 358 because it was an attempt to restrain further prosecution of an action still pending in a state court before judgment. The opinion of this court in this case, as we construe it, distinctly recognizes the right of a federal court plaintiff to enjoin a successful litigant in a prior state court action from making an unconscionable use of a judgment secured in the state court.

> "Besides a challenge of the jurisdiction of the state court for want of due process over defendant *in personam*, to be interposed in that court, and, if

> overruled, followed by invoking the revisory jurisdiction of this court, the final judgment may be questioned collaterally, if in truth there be a want of due process, either defensively, as in Pennoyer v. Neff, 95 U. S. 714, 723-733; see, also, York v. Texas, 137 U. S. 15, 20-21; Western Indemnity Co. v. Rupp, 235 U. S. 261, 273; Baker v. Baker, Eccles & Co., 242 U. S. 394, 401-403; or by adopting the more aggressive method pursued in Simon v. Southern Ry. Co., supra; see, also, Wells-Fargo & Co. v. Taylor, 254 U. S. 175, 183-185. (P. 361-2) ''

Louisville Trust Company v. Cincinnati, (C. C. A. 6) 76 Fed. 296, relied upon by respondent at page 20 of its brief, upon analysis and contrast with the decisions by this court and the decision of that court in *Ballard & Ballard Company v. Munson Steamship Line,* 25 Fed. (2d) 252, does not furnish any support for the proposition that the injunction granted by the District Court violates Judicial Code Section 265.

The sentence from the opinion in the *Louisville Trust* case principally relied upon by respondent is as follows:

> "Neither would it have been proper, under Section 720, Rev. St., to have enjoined the City from applying for any writ which the state court might lawfully issue, or to have prevented, by injunction, the execution of such writ, although its execution might have veen very destructive to the interests of this complainant."

Respondent practically recognizes at page 20 of its brief that this statement constituted dictum because no such injunction was involved in that case, but in any event under the decisions of this court in *Simon v. Southern Railway Co.,* 236 U. S. 115; *Essanay Film Mfg. Co. v. Kane,* 258 U. S. 358, and other cases that statement can-

not be regarded as law. The Louisville case was decided in 1896. The Simon case was decided in 1915. In that case this court first held that after final judgment in the state court there were no "proceedings" pending in the state court to which Section 265 was applicable, and affirmed the judgments of the lower Federal Courts in awarding a perpetual injunction *restraining Simon from enforcing his state court judgment by levy.* Hence, to the extent that any statements contained on page 317 of the opinion in the Louisville case may seem to be a decision in support of respondent's position, such decision must be regarded as having been expressly overruled by this court.

II.

Equitable Relief is Justified Because of Action Taken and Threatened by the Respondent City.

That portion of respondent's brief, pages 24 to 30, inclusive, is devoted to contentions that upon the record there is no showing that petitioner is entitled to the protection by injunction of its rights in the mortgaged franchises and properties of Ohio Electric Power Company in Norwalk. It is first contended that the action of the City Council in passing the resolution of March 23, 1926 and the ordinance of May 18, 1926 (plaintiff's exhibits 42 and 45; R. 445-449) do not constitute laws impairing the obligation of contract, but show only an intention upon the part of the city to follow orderly processes of litigation to determine the rights of petitioner's mortgagor.

This subject is dealt with in our main brief at pages 48 and 49. It is pertinent here to observe that the respondent says, beginning at the foot of its brief, page 27:

> "These resolutions taken as preliminary steps to apply to a court of the country for an adjudication of the rights of the parties are not laws impairing the obligation of a contract."

We ask "The rights of what parties"? The answer is obvious that the only court action which followed the village ordinances in question was the quo warranto suit directed only against Ohio Electric Power Company, in utter disregard of the rights of this petitioner. How can it then be said that the city was following orderly processes of law with respect to the determination of any rights of this petitioner? And we point out again that the quoted sentence from respondent's brief is a further showing, if any be necessary, in the very words of respondent itself, that the respondent was the motivating force behind the quo warranto suit, and that it is therefore necessary that the city be enjoined, if petitioner's rights are not to be destroyed.

In the next place, page 29 of respondent's brief exhibits an inconsistency in its claims with respect to violent destruction of the Norwalk properties, which is nothing less than absurd. On this one page of the brief respondent succeeds in taking exactly opposite positions upon the point. First, the respondent says that the poles and property used by Ohio Electric Power Company which were forcibly removed in 1927, (in violation of the agreement then existing between the city and Ohio Electric Power Company for the preservation of the status quo) were removed under authority of the ordinance of July 1, 1924. In the very next paragraph respondent says as soon as city officials learned of the removal the employees carrying on the work were ordered to desist, and in the next paragraph respondent characterizes the removal of the poles as being "unauthorized action of employees of the department of light and water." *So, in the words of the respondent, first the removal and destruction of this property is authorized, and in the next breath it is unauthorized.*

The fact of the matter as to the intention of the respondent city appears from the finding of the District Court to the effect that it was a case of "proceeding surreptitiously and practically in the night time in removing nine or ten poles on the early morning of October 26, 1927", (R. 237) and that petitioner was entitled to an injunction which would prevent a repetition of like conduct on the part of the city, which the trial court was convinced would follow unless an injunction issued.

We allude briefly also to respondent's claim that any statements attributed to Mr. Craig at the time the bill of complaint herein was filed with respect to the intention of the city, cannot be regarded as proof of any intention upon the part of the respondent to use force or unlawful means to oust petitioner's mortgagor, because at the time Mr. Craig had not been employed to represent respondent in *this litigation*. The answer to this is that it makes no difference that he had not then been employed in *this case*. He was at the time in the employ of the city for the purpose of conducting the quo warranto suit, which had for its object the ouster of petitioner's mortgagor (plaintiff's exhibit 45; R. 449), and undertook to speak for the city which has never attempted to repudiate his statement of the city's intentions.

III.

Petitioner Has a Valid Lien Upon Existing State Granted Franchises of its Mortgagor in the Streets of Respondent.

1. The Ordinance of October 7, 1890, Was Ineffective as a Franchise Grant, But Became Effective as a Mode of Use Agreement.

Pages 32 to 36 of respondent's brief are devoted to the argument that the Act of January 26, 1887 did not repeal the Act of May 12, 1886, so that it is claimed the council of

the respondent city had full authority to pass the ordinance of October 7, 1890 under the former act. This is a step in respondent's argument that the ordinance constituted a contract binding upon petitioner's mortgagor as the ultimate successor to The Norwalk Incandescent Light Company, the partnership organized in 1890, to which the ordinance was directed.

We think it is conclusively demonstrated by the case of *Hardin-Wyandot Lighting Company v. Upper Sandusky,* 93 O. S. 428 that the 1887 Act did repeal that of 1886 and shall not repeat at this point the argument contained in our main brief (pp. 63, 64 thereof).

In any event, petitioner is not forced to rest its case upon the repeal of the 1886 Act by that of 1887. As shown in our main brief (pp. 92 to 95 thereof and authorities there cited) the predecessor companies of petitioner's mortgagor, when they were incorporated in 1891 and 1895, could and did derive perpetual franchises direct from the state, and even if the ordinance of 1890 be construed as a franchise, its acceptance could not prejudice or limit the term of the state granted rights.

Respondent, as anticipated, contends that in the absence of any state statute specifically authorizing the city to grant a franchise, the city nevertheless had such power by reason of its inherent general power to regulate and control its streets. This proposition of the respondent is not supported by a single one of the cases cited therefor at pages 37 and 38 of its brief. In every one of these cases it is apparent that the city acted not under a general power, but did so pursuant to a specific statute. *Kinsman Street Railroad Co. v. Broadway R. R. Co.* 36 U. S. 239, is disposed of on that basis in our main brief at page 75 thereof.

Hattersly v. Waterville, 16 O. C. C. 226, decided in

1904 and having no relation to the conditions prevailing with respect to electric light companies from 1887 to 1896, was a case where there were specific statutes regulating the construction of street railroads in municipalities, and while there is language in that case indicating the court's view that a municipality had general powers to permit the operation of street railroads through its streets, the reasoning proceeds expressly upon the basis that the streets are primarily for a means of transportation and conveyance.

Columbus Citizens Telephone Co. v. Columbus (1913) 88 O. S. 466, involved the right to place telephone wires in conduits under the street, as to which it has been uniformly held that the consent of the city must be obtained.

Columbus v. Public Utilities Commission (1921) 103 O. S. 79, for the same reason is equally inapplicable. It clearly appears that the statutes there in effect required the consent of the city as a condition precedent, and that the city was acting not under a general power to control streets, but under the authority of state statutes (pages 89 to 92 of that opinion). Anything said by Judge Wanamaker in his concurring opinion cannot be regarded either as the law of that case or as the law of Ohio.

Pike's Peak Power Company v. Colorado Springs (C. C. A. 8, 1900) 105 Fed. 1, involved an entirely different question, and it appears in the opinion in that case at page 10 that the city acted under the express authority of state statutes.

Thus the cases relied upon by respondent do not support its contentions.

Respondent at pages 39 to 44 inclusive of its brief claims that this court and the courts of Ohio have uniformly held franchise ordinances such as the ordinance of October 7, 1890 to be valid contracts binding upon the util-

ity and its transferees. Any such conclusion could be reached only upon the most superficial examination of the cases in question, as we shall show. Authorities not dealing with the particular state of the Ohio law as it existed between 1887 and 1896 with reference to franchise rights of telegraph, telephone and electric light companies in municipalities do not apply. Such franchises during that period were derived only from the state; municipalities could not grant this type of franchise. Their only function was to agree upon the "mode of use". *Zanesville v. Zanesville Telegraph & Telephone Company,* 64 O. S. 67; *Farmer v. Columbiana Telephone Co.,* 72 O. S. 526; *Queen City Telephone Co. v. Cincinnati,* 73 O. S. 64; *Hardin-Wyandot Lighting Company v. Upper Sandusky,* 93 O. S. 428, 251 U. S. 173.

Northern Ohio Traction Company v. Ohio (1918) 245 U. S., 574 was a case where a street railway franchise was granted by county commissioners, but the commissioners had the express power to make the grant under a specific statute not under consideration here. Obviously there is nothing in that case in derogation of the proposition that the corporations organized in 1891 and 1895 acquired their franchise rights directly from the State of Ohio, unaffected by any time limitation contained in the 1890 ordinance.

In neither of the other two cases, *Hardin-Wyandot Lighting Company v. Upper Sandusky,* (1919) 251 U. S. 173, and *Ohio Public Service Company vs. State,* 274 U. S. 12, did this court consider the general power of a municipality apart from statutory authority.

An analysis of the Ohio Public Service case shows that it does not support the proposition urged for it by respondent. Contrary to what respondent claims, the opinion by Judge Allen in that case in 113 O. S. 325 shows that the nature of the grant secured by the company from

the state was practically not discussed in argument. (Pages 330, 331 of that opinion).

It is further evident that although the opinion contained considerable discussion as to the nature of such rights, the decision turned simply upon the question as to whether those rights, whatever they were, were assignable in 1907 in view of the provisions of the Act of 1896. At page 333 the court said:

> "It is not of great moment to decide whether the respondent is correct in claiming that the ordinance of 1892 constituted a special franchise to use the streets of the village. In either case, whether the right in question was derived from the state or the village, it was not under the circumstances set forth in this record assignable."

The court did, however, practically recognize that state granted rights were involved at page 337:

> "* * * *The rights acquired* by the Orrville Light, Heat & Power Company *from the state in 1893,* under Sections 3454 and 3471a, Revised Statutes, could not be annulled or revoked by the village of Orrville, nor by the State of Ohio, after the passage of the amendment of 1896." (Italics ours)

When this court came to review the Ohio Public Service case (274 U. S. 12) as we construe the issues and the decision, this court was concerned solely with the question of revocability of the franchise rights as determined adversely to the company in 113 O. S. 325. It is not evident from the opinion of this court that its decision turned upon the question as to whether or not there was a state or municipally granted franchise as respondent claims, but that this court simply held consistently with *Northern Ohio Traction Company v. Ohio, supra,* that the franchise rights

which the State Supreme Court had found to exist were not subject to termination at the mere will of the city, and that if the statute of 1896 were construed to sustain such a right to terminate the franchise, it was in conflict with the contract impairment clause of the federal constitution. We submit that the decision in the case would have been the same whether or not the franchise was from the state or the municipality, so that it was wholly unnecessary for this court to go into the question as to the source of the franchise. And we submit that in *Hardin-Wyandot Lighting Company v. Upper Sandusky,* 93 O. S. 428, 251 U. S. 173, neither the court nor the Ohio Supreme Court gave effect to the ordinance there involved as a contract. The decision in each court went upon the ground that the Act of 1896 prevented the utility from resuming its street lighting business without the consent of the Village *after having abandoned such rights.* See our main brief pp. 64-66. The result may be tested in another way. If, as respondent says, the ordinance in that case had been regarded as a contract, obviously the abandonment by the Company of the street lighting obligations would have been such a breach thereof that the courts would have held that the company was not entitled to continue operation of its commercial lighting system, the right to continue which both courts were careful to recognize.

The cases of *Cleveland v. Cleveland City Railway Company,* 194 U. S. 517, and *Columbus Ry. Light and Power Company v. Columbus,* 249 U. S. 399, can afford no comfort to respondent, because they were both street railway cases and under the statutes involved therein the municipality had express statutory authorization to fix the terms and conditions upon which the railway company might use the streets, as distinguished from the statutes involved in the case at bar, where the city had no such authority.

Admittedly, respondent does not claim that its council had authority to pass the ordinance of October 7, 1890, under the Act of 1887, which we contend repealed that of 1886. See p. 41 of respondent's brief. The respondent also says that it had inherent power to make the grant without respect to the Act of 1886 (p. 36 of respondent's brief). The lack of reason in respondent's claim thus more fully appears, for if there was full power in the City to make such a grant, which upon acceptance would become a binding contract, then there was no reason why either the Act of 1886 or that of 1896 should have been passed by the State Legislature.

Respondent at page 44 of its brief quotes from the separate concurring opinion of Marshall, C. J. in *Columbus v. Public Utilities Commission*, 103 O. S. 79, to the effect that the "principle of entirety of contract must apply" to that case, and on this basis the claim that petitioner cannot have the benefit of the 1890 ordinance as a mode of use agreement and at the same time invoke the aid of the court of equity for relief from its time limitations, upon the principle that entirety of contract applies. In that case no four of the judges could agree why the case should be decided as they decided it (103 O. S. 79) and what Marshall, C. J. said has no application here. The authority cited and the quotation therefrom is utterly inapplicable because the respondent assumes at least three things which are not true; first, that the ordinance constituted a contract; second, that the petitioner herein is asking relief from any of its conditions, and third, that petitioner is relying upon it as the mode of use agreement now in effect.

It is asserted by respondent at page 45 of its brief that petitioner in claiming the benefit of the 1890 Ordinance as a mode of use agreement becomes bound by the

20 year limitation of term contained therein as a limitation upon the franchise rights themselves. This contention ignores the decisions in *Farmer v. Telephone Company*, 72 O. S. 526, *State, ex rel Matthews, v. Central Union Telephone Company*, 14 O. C. C. 273, and *Macklin v. Home Telephone Company*, 1 O. C. C. (N. S.) 373, affirmed 70 O. S. 507.

In all these cases ordinances purporting by their language to grant franchise rights were treated only as mode of use agreements, and restrictions, terms or conditions sought to be imposed by such ordinances were held to be beyond the powers of the municipalities.

In *Farmer v. Telephone Company* the ordinance, which was in the form of a franchise, undertook in terms to impose certain conditions as to rates and free service upon the utility, ran to an individual and his assigns and it was assigned to a corporation. That is the precise situation in the case at bar, the only difference being that here the city claims the right to make effective a limitation as to the term of the rights instead of an exaction as to rates and free service as in the Farmer case. The utility having been held in the Farmer case to be entitled to stand upon the state granted franchises unaffected by the attempted exactions as to rates and service, it follows that petitioner may stand upon the state granted franchises of the corporations organized in 1891 and 1895 respectively unaffected by the attempted 20-year term limitation of the Norwalk city ordinance.

Respondent also relies heavily upon the opinions of the State courts in the quo warranto case. We have pointed out in our main brief (pp. 42, 43, 68-70) why those decisions are not controlling, and shall therefore not repeat that exposition here.

2. The Franchise Rights of Petitioner's Mortgagor in Norwalk Are Incontestible.

Respondent at page 54 of its brief launches into the argument that the predecessor corporations of petitioner's mortgagor which were organized in 1891 and 1895 respectively secured thereby nothing more than the capacity to acquire an easement in the streets and public places of Norwalk. In other words, the claim is that incorporation conferred upon those companies an inchoate right of eminent domain, which respondent claims further was never exercised by agreement with the City or by proceedings in the Probate Court, hence that the right never reached any fruition or became vested, and being inchoate was incapable of assignment.

We feel obliged to point out that counsel for the respondent at page 88 of their brief misstate our position by claiming that we contend the predecessor corporations by incorporation alone secured a complete and vested right to use the streets and public places of Norwalk.

Respondent would have this court believe that the sole inquiry is what franchises did The Incandescent Light & Power Company and the Northern Electric Company secure by incorporation. This is to state but half of the question. We do not contend, as respondent would have this court suppose, that an electric light company could incorporate in 1891, thereafter do absolutely nothing, and now enforce a state granted right to go upon the streets of Norwalk with its poles and lines. Respondent has merely erected and demolished a straw man. Obviously such an incorporation followed by nonuser of the right would constitute a waiver and abandonment thereof. *Hardin-Wyandot Lighting Company v. Upper Sandusky*, 93 O. S. 428. However, such rights could not be defeated or limited by the respondent city so long as the companies

formed in 1891 and 1895 seasonably undertook to exercise them. In other words, reaffirming the position stated by us in our main brief at pages 50 and 51, the companies organized in 1891 and 1895 derived thereby from the State of Ohio perpetual franchises in Norwalk subject only as a condition subsequent to the making of an agreement with the city as to the mode of use of the streets and public places, or in the event of any disagreement or failure to agree, to direction by the Probate Court as to the mode of use. That this condition subsequent has been satisfied because the predecessor companies organized in 1891 and 1895 and all their successors have always exercised their state granted rights under an agreement with the city as to mode of use, we have demonstrated in our main brief, pages 71 to 92, inclusive, and we shall not repeat that argument here.

But it is said by respondent that the question is one of statutory interpretation as to which it cannot clearly be said that the predecessor companies acquired anything more than the capacity to secure an easement, with cases cited at page 55 of respondent's brief. Of those cases *Blair v. Chicago,* 201 U. S. 400, *Cleveland Electric Ry. Co. v. Cleveland,* 204 U. S. 116 and *Wabash R. R. Co. v. Defiance,* 167 U. S. 88 state a general rule under greatly different circumstances, which is undoubtedly correct. Those cases involved such matters as street railway franchises under statutes making the consent of the municipality an express requirement, and the powers of cities to make changes in the grants of streets. Here under the statutes in force from 1887 to 1896 and the unwavering line of decisions construing them, one thing is clear, namely, that the *consent* of the city to the exercise of franchise rights by telegraph, telephone and electric light companies *was not required.*

Approaching the question from another angle, respondent in furtherance of its eminent domain theory, asserts that the statutory privilege of the municipality to agree upon mode of use did not relate to or mean the exercise of the police power. That contention cannot be sustained. In *Macklin v. Home Telephone Company*, 1 O. C. C. (N. S.) 373, affirmed 70 O. S. 507, the court said:

> "* * * The right of use of the streets and public ways by the telephone company is wholly beside and independent of the municipality, and, of course, is to be enjoyed like any other right, without let or hindrance from the municipality, except in the proper exercise of its police power and the efficient discharge of the duty imposed upon it by the provisions of Section 2640, Rev. Stat. to 'keep the streets, avenues, alleys, sidewalks, public grounds and bridges within the corporation open and in repair, and free from nuisance.' Power to discharge the duty imposed by Section 2640, Rev. Stat., in connection with the construction of a telegraph or telephone plant is given by Section 3461, Rev. Stat., and is expressly limited to an agreement fixing the mode of use of the streets and public ways; * * * " (P. 378).

Queen City Telephone Company v. City of Cincinnati, 73 O. S. 64.

Respondent, in its brief p. 67, claims that the immediately foregoing case supports its argument that the predecessor companies secured only an inchoate right of eminent domain and quotes copiously from the opinion. In fact, respondent assumes and claims that the following quotation, taken from page 81 of the opinion, refers to the right of eminent domain discussed on page 77 of the opinion. The quotation is:

> "* * * But, taking the sections of the statute as a

> whole and considering the conditions imposed on the exercise of such right, it is not to be inferred that the municipal authorities are stripped of all power to finally determine any matter relating to the general subject." (P. 81)

Respondent neglects to cite to this court the two sentences immediately following, on page 81 of the opinion, which are as follows:

> "* * * It will be remembered that by section 2640 those authorities are given the control of the streets and are required to keep them open, in repair, and free from nuisance. It is to be noted, also, that by no statute is power given any tribunal to authorize permanent structures upon or in, or the use of any street, which will incommode the public, the dominant purpose being to facilitate public travel and transportation." (P. 81)

We respectfully submit that respondent's assumption has no basis except a wish. We submit it is clear that the sentence relied upon by respondent quite naturally refers to the immediately following sentences, which we have just quoted and which clearly exhibit the opinion of the Ohio Supreme Court that it was the police power which was involved.

And we further submit that it is demonstrated beyond any further question that the words of the statutes giving the city the right to agree upon a mode of use constitute a recognition of the city's right to a reasonable exercise of the police power by *Hardin-Wyandot Lighting Co. v. Upper Sandusky*, 251 U. S. 173 at page 178.

It is not necessary, as respondent suggests, for us to maintain the proposition that the city could barter away its police power. Nothing in the statute with relation to mode of use indicates that the mode of use must be fixed

for any certain length of time. An agreement under the statute by the city and the utility with respect to mode of use for the duration of one hour accompanied by the exercise by the utility of its rights in the streets under the statute would have been a sufficient performance of the condition subsequent as to a mode of use agreement. We direct the court's attention to the fact that from 1890 to July, 1924 the predecessors of petitioner's mortgagor occupied the streets without a suggestion from the respondent city that there should be any change in the mode of use. On July 1, 1924 the city's council enacted a new ordinance regulating the construction and maintenance of electric light and power wires and petitioner's mortgagor and its predecessors complied therewith. How can it then be said that there has ever been a failure to satisfy the requirements of the 1887 statute which provided that the city and the company might agree upon the mode of use? How can it be said under such facts that any of the predecessor companies were ever obliged to exercise an inchoate right of eminent domain in order to secure a vested easement as the city argues?

We direct attention, briefly, to some of the authorities relied upon by the city for the proposition that it could impose a limitation of term which would be binding upon petitioner's mortgagors and its predecessors. *State Ex Rel v. Central Union Telephone Co.*, 11 O. C. C. 55 (respondent's brief page 70) was decided six years before *Zanesville v. Zanesville Telegraph and Telephone Co.*, 64 O. S. 67, and to the extent the statements contained therein are in conflict with the *Zanesville case* and the line of cases following it, they can not be regarded as law. Furthermore *State Ex Rel v. Central Union Telephone Co.* was again before the Circuit Court in 14 O. C. C. 273 upon the merits and it was then held that the city was in no position

to oust the company until it was made to appear that no agreement as to mode of use could be made and that the company, after such failure, delayed unreasonably in applying to the Probate Court to fix a mode of use. The decision went upon the ground that the words in the proposed ordinance as to rentals was an attempt by the municipality to secure an illegal exaction in violation of *Section 3461, Revised Statutes. This holding was necessarily inconsistent with the first ruling.*

The broad contention of the respondent city that it could actually place a limitation in time upon the state granted rights is also based upon another line of cases construing statutes patently dissimilar from the statutes here considered.

Louisville Trust Company v. City of Cincinnati, (C. C. A. 6) 76 Fed., 296 involved the street railway statute of 1852 which empowered municipalities "to agree upon the *manner* and upon the *terms and conditions*" (italics ours) upon which their streets might be used. It will be seen at once that the word "manner" in that statute is equivalent to the term "mode of use" in the statute here under consideration, and that the broader phrase "terms and conditions" in the street railway statute therefore cannot possibly be synonomous with "mode of use" as respondent so pontifically asserts at page 79 of its brief.

Furthermore, in the very quotation from the Louisville Trust Case given in respondent's brief at page 76, the court points out the distinction between franchises conferred by the state by organization under the state law, and franchises such as those arising under the street railway act which come from the municipality.

Pomona v. Sunset Telephone Company, 224 U. S. 330 involved a constitutional amendment making the right of utilities dependent upon such conditions as the municipal-

ity might prescribe. *Southern Bell Telephone & Telegraph Co. v. Richmond*, 103 Fed. 31 involved a statute giving use of streets with "consent" of the city. *Indianapolis v. Consumers Gas Trust Company*, 144 Fed. 640 involved an Indiana statute expressly conferring upon the city the right to grant or refuse a license. *In Re Rochester Electric Railway Company*, 123 N. Y. 351, involved a statute requiring municipal consent. *The State, Ex Rel. Martin v. The Ohio Electric Power Company*, 35 O. A. R. 481, affirmed 121 O. S. 235 has been dealt with in our main brief at pages 68-70. *Pawhuska v. Pawhuska Oil and Gas Company*, 28 Okla. 563 was concerned with a statute containing the words "subject to the control of the local municipalities." *Toronto Electric Light Company v. Toronto*, 1917 A. C. 84, 33 Ont. L. Rep. 267 is likewise beside the point because, under the statutes there involved, no right could exist or continue without the consent of the city.

The cases relied upon by respondent can not be regarded as applicable upon the ground that the right to fix "terms and conditions" or to require the "consent" of the municipality is the same as the right to agree on mode of use. Any such contention ignores the fact that the statute conferred no absolute powers upon municipalities, but that in the event of failure to agree, provision was made for resort to the Probate Court to direct the mode of use. Whatever might have been the interpretation relative to the occupation of streets by railroads, the Ohio Supreme Court has held time and again that the privilege of agreeing as to mode of use does not amount to the right to impose "terms and conditions." *Zanesville v. Zanesville Telegraph and Telephone Company*, 64 O. S. 67; *Farmer v. Columbiana County Telephone Co.* 72 O. S. 526; *Queen City Telephone Company v. Cincinnati*, 73 O. S. 64.

The franchises are in perpetuity.

Northern Ohio Traction Co. v. Ohio, 245 U. S. 574; *Old Colony Trust Co. v. Omaha*, 230 U. S. 100, 112-117.

Respondent's whole argument, that the predecessor companies secured only an inchoate right of eminent domain, which was not assignable, and which was swept away by the Act of 1896, is permeated by the fallacious assumption that there was never any agreement as to mode of use. An agreement as to mode of use for any length of time prior to the Act of 1896 was sufficient to make the franchise rights indefeasible so far as the city is concerned.

There has always been agreement as to mode of use. The city by the ordinance of 1890, which in terms dealt with mode of use, tendered an agreement which ran to a named partnership, its successors and assigns for a period of twenty years. The city knew at the time that the intention of the partners was to form a corporation (see supra, page 2 and record pages 61, 62 and 63). The city knew of the transfer of all the partners' property, including any rights in the 1890 ordinance to the corporation formed in 1891. Thereafter all of the successors in title used the streets of the city with the city's full knowledge in accordance with the terms of the ordinance of 1890. The city dealt contractually with regard to street lighting with some of the companies by contracts made in 1895 and 1905. At the conclusion of the twenty-year period in 1910, and thereafter, the various companies continued the same mode of use. The various companies and the city have for years made joint use of each other's poles, pursuant to ordinance passed in 1916 (plaintiff's exhibit 37, R. 436) after the time when the city claims all rights were gone. When the various companies made any changes in the system the approval of the city authorities was obtained. The city has never to the present time demanded

any new agreement of any kind, with the exception of the ordinance of 1924. The companies have complied with the ordinance of 1924, and without repeating the facts as set forth in our main brief at pages 83 to 89, the city is now estopped to say that there was never any agreement as to mode of use.

Upon these facts it is ridiculous to talk about an inchoate right of eminent domain.

It is asserted by respondent that an agreement as to mode of use under the Act of 1887 could be made only by the method prescribed under Revised Statutes of Ohio Section 1693, respondent's brief page 95. A glance at that statute shows that it was referable only to contracts by a municipality, that is, obligations by which the municipality would become bound for the payment of money or some other valuable consideration. Cities between 1887 and 1896 having had no rights to exact compensation, impose terms or otherwise contract with electric light companies as to the right to use the streets, respondent's argument based upon this statute must fall, because it is based upon the false premise that municipalities could contract with regard to the occupation of their streets by such companies

The case of *Sears, Trustee, v. City of Akron*, 24 U. S. 242, respondent's brief page 105, was concerned solely with the effect of legislation upon inchoate rights. The same observation applies to the cases cited at page 108 of respondent's brief. As pointed out in our main brief and by the District Court, the record shows no attempt by the state to exercise the reserve power with reference to the rights of petitioner's mortgagor or its predecessors.

The case of *Ohio Public Service Company v. Ohio, ex rel Fritz*, 274 U. S. 12, effectively disposes of the argu-

ment, that the franchise rights could be cut off on the strength of the Act of 1896.

Respondent's argument to the effect that the Ordinance of July 1, 1924 does not have any bearing upon this case consists of the assertion, without any authority therefor, that the ordinance could not be a consent to the use of the streets under the Act of 1896 and could not be an agreement as to mode of use under the Act of 1887. It is said to be solely a unilateral act by the city in the exercise of the police power. While we most emphatically deny that it was necessary for the predecessor company operating in Norwalk at the time this ordinance was passed to secure a consent under the Act of 1896, if this court should be of the opinion that such a consent was requisite, no reason whatever is given nor authority cited as to why the ordinance could not constitute such consent.

Certainly the company accepted the provisions of the ordinance by complying therewith. If, as we maintain, the ordinance upon compliance therewith by the company amounted to a modification of the old agreement or a new agreement as to mode of use, the contention that the ordinance was a police measure is perfectly consistent with the position that we have taken, that the provision for agreement as to mode of use in the 1887 Act was for the sole purpose of recognizing the police power of municipalities.

Cincinnati v. Diamond Light Co., 4 Ohio App .177, cited at page 116 of respondent's brief has no bearing here. Respondent says in that case the court denied a claim that an ordinance similar to that of July 1, 1924 constituted a grant of right to lay conduits in the streets. That the ordinances are not similar is shown by the quotation from the Cincinnati ordinance, page 117, respondent's brief, from which it appears that it was applicable only in the

event that municipal grants by *other* ordinances should first be made. The court's decision there was based on a provision which was omitted from the Norwalk ordinance of 1924. The case therefore inferentially supports *our* position.

IV.

The Question As To The Existence Of The Franchise Rights And Petitioner's Interest Therein Should Be Determined According To The Law Of Ohio As Established At The Time The Mortgage Was Given And The Bonds Issued.

We have been informed by counsel for the respondent City that they will rely in argument upon the case of *Hawks v. Hamill*, 288 U. S. 52. Apparently their claim will be that that decision by this court supports their contention that this court should follow the decision in the quo warranto case (*State ex rel Martin v. Ohio Electric Power Co.*, 121 O. S. 235) decided after the acquisition of petitioner's rights involved herein.

Hawks v. Hamill having been decided January 9, 1933, the facts of that case are undoubtedly fresh in the minds of the members of this court and we shall not repeat them. As we construe the language of this court in that case, it does not enunciate the standards of independent judgment which this court would deem appropriate under the far different conditions of the case at bar. There the jurisdiction of the Federal Courts was invoked solely upon the ground of diversity of citizenship. Here the jurisdiction of the Federal Courts is invoked by petitioner not only upon the ground of diversity of citizenship, but also upon the claims of contract impairment and lack of due process of law. This court in the Hawks case specifically recognized that different standards of independent judgment would be appropriate under the conditions here present.

"* * * No controversy is here as to the impairment of the obligation of a contract in violation of the restraints of the federal constitution. *We are not to confuse the standards of independent judgment appropriate in such conditions* * * *.*" (Italics ours)

Page 59 of that opinion.

Coombes v. Getz, 285 U. S. 434, 441;
Schriver v. Woodbine Bank, 285 U. S. 467, 475.

There the perpetual franchise to construct and operate a toll bridge was invalid under the single state court decision rendered *after* the acquisition of the franchise because it violated a provision of the State Constitution prohibiting perpetuities, which provision was in existence at the time of the grant. Here, according to the law of Ohio existing at the time of the franchise grants, as interpreted by an unbroken line of decisions by the Supreme Court of Ohio and by this court in cases from Ohio, rendered prior to the acquisition of petitioner's rights, the franchises were valid grants in perpetuity.

There, although the decision of the Oklahoma Supreme Court interpreting the term "perpetuities" as used in the State Constitution came after the franchise grant, there had not been prior to the grant any decision by the state courts passing upon the validity of such a perpetual grant as that relied upon. Here, prior to the acquisition of petitioner's rights, there had been, as stated above, an unwavering line of decisions, in reliance upon which the rights of the bond-holders were acquired prior to the institution of the quo warranto suit.

There the case did not call for a decision as to the ownership of the bridge or the right of complainants to tear it down thereafter, but related to the privilege of

complainants in exacting payments from the public for its use while maintaing an obstruction of navigable waters. Here the case involves the very essence of the bondholders' security and does not involve any public interest such as that in the Hawks case. Here the respondent city is interested in ousting petitioner's mortgagor which will result in destroying the mortgaged property only in the proprietary capacity of the City for its profit, because the City in 1915 erected and put into operation a municipal plant which competes for the commercial business.

Furthermore, the decision in the quo warranto case was made on a vitally different record from that in this case. It is not unlikely that on this record the decision of the Ohio Supreme Court could have been the same as that of the District Court. This court in the Hawks case, stated the principle that the single decision of the state court to be followed should be clear and unequivocal. The quo warranto decision does not meet that requirement. In fact it is *not* a decision at all of the case made by petitioner in the courts below.

V.

The Rights Of The Predecessors Of Plaintiff's Mortgagor Were Not Terminated By Any Provision Of The Public Lighting Contract Of 1905.

We shall not repeat the argument contained in our main brief upon this feature, but will allude briefly to the wholly unjustified claim at page 119 of respondent's brief that the contract included within its scope rights with respect to commercial and residence lighting service. It will be noted by a reference to the clause in the contract of 1905 (see respondent's brief page 119) which did mention commercial and residence lighting, that it was for the sole purpose of preserving the right of the city to revoke the

street lighting rights, in the event the company should fail either to furnish street lighting or commercial and residence lighting no such failure ever occurred), and obviously had no other or further effect.

See also the opinion of the Supreme Court of Ohio in the quo warranto case, 121 O. S. 235, where the court said, speaking of the 1905 contract:

> "* * * no reference being made therein to commercial lighting * * * "
>
> (Appendix to respondent's brief, page 175).

VI.

The Respondent City Is Estopped To Deny That An Agreement As To Mode Of Use Has Always Existed.

At page 124 of its brief respondent sets forth an imperfect recitation of the bases of the estoppel which we claim.

The bases of the estoppel upon which we rely are set out at pages 84, 85 and 91 of our main brief.

Respondent claims that no estoppel can be predicated upon the construction of the plant and distribution system in 1890 because the ordinance was a grant to a partnership and conveyed no rights after 1910. The claim ignores the facts that *the ordinance ran to the successors and assigns* of the partnership and the council knew at the time that there was to be a corporate successor, and of course the corporate successors invested their money in the system with the full knowledge and acquiescence of the city. The generating plant erected in 1895 was of double the capacity required to furnish service both to the public and private needs of the city (R. 68) and would not have been built except upon the understanding that the company possessed a continuous right to serve private consumers (R. 73, 75). The claim at page 129 of respondent's

brief that the city took the position at conferences in 1914 between city officials and reprentatives of the Cleveland, Southwestern and Columbus Railway Company that the company was without right to occupy the streets after September 1, 1915 has no basis whatever in anything contained in the record at the pages cited or anywhere else. Respondent says that no claim of any franchise right, perpetual or otherwise, was ever made by any of the companies. There was no occasion for any such assertion until the Village challenged the company's right by the 1926 ordinances. The Village knew, however, that the various companies were openly and notoriously operating in the streets at all times obviously under a claim of continuing right. The duty was on the city to notify the company if it was dissatisfied with the mode of use. This is not a case of continued use of the streets after termination of a franchise. The point is the city by its conduct led the various companies to believe the mode of use was satisfactory. The city is therefore estopped to assert that there is no such agreement. Contrary to what respondent says at page 131 of its brief, there is evidence of capital investments after 1910. (R. 78, 84, 99). Respondent cannot help itself on the issue of estoppel by claiming as it does at pages 131, 132 that the equipment of petitioner's mortgagor in the City of Norwalk is in a sad state of repair upon the basis of fragmentary bits of evidence in the record. Neither can respondent avoid the estoppel by the statement at page 133 of its brief that it had nothing to do with the assessment of taxes and no standing to object thereto. The point is it received its portion of the taxes without objection. (R. 280.)

D.

CONCLUSION

Our omission to mention herein any other matters touched upon in respondent's brief is not to be construed as an admission of statements contained therein. We think any such matters are effectively disposed of in our principal brief.

Respectfully submitted,

GEO. D. WELLES,
Toledo, Ohio,
Counsel for Petitioner.

EARL F. BOXELL,
Toledo, Ohio,
TRACY, CHAPMAN & WELLES,
Toledo, Ohio
ARTHUR A. GAMMELL,
New York, N. Y.
TIMOTHY N. PFEIFFER,
New York, N. Y.
MILBANK, TWEED, HOPE & WEBB,
New York, N. Y.
Of Counsel for Petitioner.